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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-707

PERCY BLAND, MARY BLUE, MAE HENRY CARTER, WILLIE V. CRUMP, ALSIE IRVING, GEORGE LANGSTON, EMMA AND GARNETTA PRICHARD, LIZZIE RICHARDSON, HENRY AND ELLEN ROZELL, HENRY THOMPSON, CHARLES WILLIAMS, and OLLIE WILLIAMS, individually and on behalf of all others similarly situated,

Petitioners.

versus

ROBERT McHANN, GORDON EMRICK, W. H. MONTGOMERY, THOMAS WALKER, and JUDGE PRICE, SR., Members of the Board of Aldermen of Edwards, Mississippi; C. E. ROBBINS, Mayor of Edwards; MRS. H. R. HARRELL, Tax Assessor and Collector of Edwards; and MRS. CLAIRE CRANFORD, Town Clerk of Edwards,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October, 1972

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

PERCY BLAND, et al., individually and on behalf of all others similarly situated,

Petitioners,

versus

ROBERT McHANN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Percy Bland, Mary Blue, Mae Henry Carter, Willie V. Crump, Alsie Irving, George Langston, Emma and Garnetta Prichard, Lizzie Richardson, Henry and Ellen Rozell, Henry Thompson, Charles Williams, and Ollie Williams, individually and on behalf of all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 463 F.2d 21 and appears in the appendix herein. The opinion of the District Court is unreported and also is included in the appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on June 29, 1972. A timely petition for rehearing and, alternatively, for rehearing *en banc* was denied on September 1, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Federal district courts have jurisdiction pursuant to 42 U.S.C. §§ 1981 and 1983 to grant relief from racially discriminatory and repressive municipal property tax assessments, regardless of the jurisdictional restrictions of 28 U.S.C. § 1341.

2. Whether Federal district courts have jurisdiction of an action seeking a refund of municipal property taxes paid on unlawful, racially discriminatory and repressive ad valorem property tax assessments, regardless of the restrictions of 28 U.S.C. § 1341.

3. Whether Mississippi law provides a plain, speedy, and efficient remedy for challenging racially

discriminatory and repressive municipal property tax assessments within the purview of 28 U.S.C. § 1341 when:

(a) Mississippi state court procedure does not provide for a class action and therefore vindication of plaintiffs' claims in state court would involve a multiplicity of suits,

(b) Mississippi law does not permit an injunction against the collection of illegal taxes,

(c) Mississippi procedure deters assessment challenges in state courts and violates due process and equal protection guarantees by penalizing a taxpayer who loses his appeal 10 percent of the amount in controversy, in addition to paying the tax owed and court costs,

(d) Mississippi law does not provide for suspending the collection of taxes based on an allegedly illegal assessment while it is being tested in state courts,

(e) Mississippi law makes no provision for the recovery of interest on illegally collected taxes if a refund ultimately is ordered by the courts, and

(f) Mississippi procedure, as applied here, did not allow for adequate notice to the class of affected taxpayers to permit them to

protest the systematic discrimination against them and did not provide for an adequate state remedy to correct the systematic discrimination.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Code, Title 28:

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

In the summer of 1966 petitioners (hereinafter plaintiffs), who are black property owners and taxpayers in the Town of Edwards, Mississippi, initiated a selective buying campaign against downtown white-owned businesses in protest of racially discriminatory business and employment practices, and also protested, by marches, picketing, leafleting, mass meetings, and

other peaceful protest activities, racial discrimination by the municipal authorities in the unequal provision of municipal services and facilities. These peaceful and constitutionally protected protest activities aroused considerable antagonism in the white community,[1] and at its November, 1966, meeting for revising the town's property tax assessment rolls, the Mayor and Board of Aldermen of Edwards, who all were white and who are the respondents here (hereinafter defendants), increased the property tax assessments on black-owned property in the town in a racially discriminatory manner, in almost half the cases doubling or more than doubling the prior assessments without justification, as revealed by the following stipulated statistics:

	White	*Black*
No. of lots increased in assessment, 1966	34	237
No. of lots not increased in assessment, 1966	166	39
Total amount of 1966 assessment increases	$16,500 (3.5%)	$131,800 (52.6%)

[1]One defendant alderman wrote and circulated on behalf of the Edwards Chamber of Commerce a leaflet expressing dire concern with the boycott and urging citizens to take action against it, which stated in part:

> "As you know, these are the most trying times we have yet had to face and we need your business as never before. Unless the citizens of this community are willing to work together to help each other, many of our businesses will be permanently affected by the boycott now in effect and some of the stores in Edwards will be forced to close."

The racially discriminatory increases in municipal property tax assessments came on the heels of an immediate prior history of racial discrimination on the part of the Town of Edwards' municipal authorities, which included the sale of the city-owned swimming pool, playground, and tennis courts to a private club to avoid desegregation,[2] and an attempt at the beginning of the boycott through enactment of a curfew ordinance with a racially discriminatory effect to close down black-owned cafes and business establishments.[3]

Prior to the assessment increases, one defendant member of the board of aldermen warned a black citizen that unless the boycott were ended, the black citizens of Edwards would have to pay for the boycott by increases in their taxes: "Well, he said, you damn niggers are going to try to boycott all the stores. The merchants can't sell the stuff. They're going to have to go out of business. He said, y'all are going to pay for this by the raising of the taxes."

Although the town budget in part consisted of revenue from city sales taxes, the boycott did not directly affect town revenues since whatever decrease in sales tax revenues resulted from the boycott was more than offset by an increase in sales tax revenue when the State Tax Commission refunded to the Town of Edwards a share of the sales taxes paid by a supermarket in another town. The defendants stipulated that the

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[2] *White* v. *City of Edwards*, Civil No. 3973 (S.D. Miss., complaint filed July 19, 1966), injunction denied, 11 Race Rel. L. Rep. 1994 (S.D. Miss. 1966).

[3] *Allen* v. *Robbins, Mayor, et al.*, Civil No. 3990 (S.D. Miss., complaint filed Aug. 15, 1966), injunction granted, Sept. 13, 1966.

1966 assessment changes were made without any formal on-site inspections to observe any construction or improvement to provide a basis for changing assessments, without any professional outside appraisals or surveys of property in Edwards for assessment purposes, and that "it is impossible for them to state with regard to each separately assessed parcel of real property on the final tax assessment roll of the Town of Edwards for the year 1966 the specific reason or reasons for each such increase," and no reasons for the selective increases in the assessments of black-owned property were contained in the town records or were offered at trial. The testimony failed to show that the increases were justified by any interim improvements or increases in property values.

A survey undertaken by a statistician-urban sociologist prior to trial showed that the racially-based differences in the assessment increases could not be due to chance (the probability of such a chance occurrence was less than 1 time in 100,000), and also showed that the 1966 assessment increases resulted in black-owned property being systematically overassessed or overvalued, and white property being systematically underassessed or undervalued, when white-owned property was compared with black-owned property of identical assessed valuation.

Plaintiffs filed this action in Federal District Court as a class action on behalf of all black taxpayers whose property had been increased in assessment, charging that the 1966 assessment increases were solely the result of racial discrimination and in retaliation for the

prior boycott and racial protest demonstrations, and claiming relief pursuant to 42 U.S.C. § 1983 to protect rights secured by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. § 1981. Jurisdiction was asserted under 28 U.S.C. §§ 1331 and 1343. The defendants are the Mayor and members of the Board of Aldermen of Edwards, the town tax assessor and collector, and the town clerk.

Plaintiffs alleged in their complaint that they and the members of their class had no plain, speedy, and efficient remedy in Mississippi courts, and supported this contention in the District Court and the Court of Appeals by showing that:

(a) Mississippi state court procedure does not provide for a class action and therefore vindication of plaintiff's claims in state court would involve a multiplicity of suits,

(b) Mississippi law does not permit an injunction against the collection of illegal taxes,

(c) Mississippi procedure deters assessment challenges in state court and violates due process and equal protection guarantees by penalizing a taxpayer who loses his appeal 10 percent of the amount in controversy, in addition to paying the tax owed and court costs,

(d) Mississippi law does not provide for suspending the collection of taxes based on an

allegedly illegal assessment while it is being tested in state courts,

(e) Mississippi law makes no provision for the recovery of interest on illegally collected taxes if a refund ultimately is ordered by the courts, and

(f) Mississippi procedure, as applied here, did not allow for adequate notice to the class of affected taxpayers to permit them to protest the systematic discrimination against them and did not provide for an adequate state remedy to correct the systematic discrimination.

By way of relief, plaintiffs sought (1) an injunction against racially discriminatory municipal property tax assessment increases, (2) an injunction against the collection of property taxes based on the 1966 racially discriminatory and repressive increases, (3) a refund of taxes already paid on the basis of the 1966 assessment increases, representing the difference between the amount paid prior to the 1966 increases and the amount paid after the 1966 increases, with interest, and (4) a roll-back of the assessments on black-owned property to the 1965 assessments or, in the alternative, a professional reassessment of all property in Edwards based on true value.

The United States District Court for the Southern District of Mississippi (Harold Cox, J., presiding) accepted the stipulated statistics of assessment increases

but denied all relief both on the merits of the complaint and on the jurisdictional ground that relief was barred by 28 U.S.C. § 1341. The Court of Appeals vacated the findings of the District Court on the merits, but sustained the dismissal of the complaint on the sole ground that the jurisdictional limitations of § 1341, which provide that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," barred the District Court from granting any of the relief requested by plaintiffs.

REASONS FOR GRANTING THE WRIT

The Court of Appeals holds that because of the jurisdictional limitations of § 1341 black property owners and taxpayers in the small town of Edwards, Mississippi, may not challenge in Federal court ad valorem property tax assessment increases which patently are discriminatory on the basis of race and imposed in retaliation for plaintiffs' exercise of First Amendment rights in the civil rights boycott and racial protest demonstrations of that summer. Plaintiffs' right to relief is clear — on prior occasions this Court has clearly held that "[t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class," *Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 623 (1946), and recognizing that the power to tax is the power to destroy has struck down efforts, through repressive taxation, to stifle the exercise of

protected First Amendment rights, *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); cf. *Denton* v. *City of Carrollton*, 235 F.2d 481 (5th Cir. 1956). The issues presented here are of exceptional importance, for unless Federal jurisdiction is available to grant class injunctive relief against racially discriminatory and punitive taxation, the forces of repression — knowing that politically and economically oppressed minorities lack the resources to challenge each separate assessment on an individual basis in state courts — will have gained a new weapon in the arsenal of contrivances available for racial discrimination and for the suppression of dissent.

I. The Decision Below Raises Substantial Questions As To The Proper Interpretation Of 28 U.S.C. § 1341 In Civil Rights Cases Seeking Relief From Racially Discriminatory Tax Assessments.

Congress in the Civil Rights Act of May 31, 1870, § 16, 16 Stat. 144 (now codified in 42 U.S.C. § 1981) specifically guaranteed the right of "all persons within the jurisdiction of the United States . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and [they] shall be subject to like. . . *taxes* . . . and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding" (emphasis added), and specifically conferred on Federal district courts original and exclusive jurisdiction to enforce the rights secured

by that section.[4] In holding that rights secured by the 1870 Act may not be enforced in Federal courts, the Fifth Circuit directly contravenes the express intent of Congress to grant a Federal cause of action in cases of racially discriminatory taxation and to grant Federal courts original and exclusive jurisdiction in such cases.[5]

The statute invoked by the Court of Appeals to deny Federal jurisdiction, 28 U.S.C. § 1341, was never intended to deprive Federal courts of jurisdiction to redress the deprivation of rights secured by the 1870 Act. Congress in enacting the Tax Injunction Act of 1937, 50 Stat. 738 (now 28 U.S.C. § 1341), addressed itself to the problem of unjust discrimination between citizens of the state and foreign corporations and enacted the statute to eliminate the practice whereby foreign corporations, principally railroads, could disrupt state financing efforts by invoking Federal jurisdiction, often on diversity grounds, and securing Federal injunc-

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[4]See Act of May 31, 1870, §§ 8 and 18, 16 Stat. 142, 144; Act of April 9, 1866, § 3, 14 Stat. 27.

[5]In addition, this Court held in *Monroe* v. *Pape*, 365 U.S. 167 (1961) that in actions brought pursuant to 42 U.S.C. § 1983 "[i]t is no answer [to the question of Federal jurisdiction] that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked," id. at 183, and this holding with respect to actions brought pursuant to § 1983 has been followed in the subsequent decisions of this Court, *Houghton* v. *Scranton*, 392 U.S. 639 (1968); *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese v. Board of Education*, 373 U.S. 668 (1963). But cf. *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (abstention appropriate where resolution of pending state court action will resolve Federal claim).

tive relief against state efforts to tax them. See S. Rep. No. 1035, 75th Cong., 1st sess. (1937); H.R. Rep. No. 1503, 75th Cong., 1st sess. (1937). There is no indication in the 1937 Act itself, or in the legislative history of the Act, that Congress in enacting the Tax Injunction Act of 1937 thereby intended to repeal or interfere with the Federal rights and jurisdiction conferred upon district courts by the 1870 statute enacted to secure the equal rights of blacks, and, barring such an express reference, the Court of Appeals was unjustified in giving such an effect to the Tax Injunction Act.

Further, there are indications in the early decisions of this Court construing the 1937 statute that § 1341 is non-jurisdictional and is not a jurisdictional bar to relief against discriminatory state taxation, but merely constitutes a precatory Congressional statement that "[i]t is in the public interest that federal courts of equity should exercise their *discretionary power* to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298 (1943) (emphasis added), and merely codifies earlier judge-made doctrine of judicial discretion that "a proper reluctance to interfere by injunction with [states'] fiscal operations" should generally result in denials of Federal injunctive relief against state taxes "where the asserted federal right may be preserved without it." *Matthews* v. *Rogers*, 284 U.S. 521, 525 (1932). See also, *Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 622-23 (1946); 1A J. Moore, FEDERAL PRACTICE ¶0.207, p. 2284 (2d ed. 1965).

While the broad language of § 1341 might be construed to impose a complete jurisdictional bar to Federal relief from unconstitutional and unlawful state taxation, this Court has recognized that the language is not all-inclusive, and that judicially implied exceptions to its strictures must be made if the purposes of other Acts of Congress and Federal policy are to be given their intended scope. Thus, this Court has carved out an exception to permit Federal injunctive relief against the assessment, levy, and collection of unconstitutional and unlawful state taxes in holding that "§ 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Dep't of Employment* v. *United States*, 385 U.S. 355, 358 (1966).

If 28 U.S.C. § 1341 were such a clear jurisdictional bar as the Court of Appeals maintains, then there should be no exceptions, and Federal district courts should be prohibited in every case where the state remedy was plain, speedy and efficient from issuing injunctions against the assessment, levy or collection of state taxes. But the commands of § 1341 have universally been held to give way in actions where the United States is a party protecting pre-emptive Federal interests. *Dep't of Employment* v. *United States*, supra. That exception was carved out by the same analytical process urged here — by an analysis of the legislative history and purpose of the statute and the conclusion that "[s]uch an action in no way involves the evils at which the Act of August 21, 1937 [28 U.S.C. § 1341] was directed." *United States* v. *Livingston*,

179 F.Supp. 9, 11 (E.D.S.C. 1959), aff'd per curiam, 364 U.S. 281 (1960).

The plaintiffs in this action come into court not to enforce purely private rights bottomed on some private property, monetary, or tax claim, but instead each of the private parties brings this action "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). The rights asserted are public rights secured by § 1981 and the Fourteenth Amendment to all citizens to be free of racially discriminatory and unconstitutionally repressive municipal taxation harassing the exercise of First Amendment rights, rights which are pre-emptive because they are of "governing importance." Cf. *Machesky* v. *Bizzell*, 414 F.2d 283, 289 (5th Cir. 1969). For Federal jurisdictional purposes, the statutory and constitutional immunity of Mississippi black people to be free of racially discriminatory and harassing municipal property taxes should be at least as significant a Federal pre-emptive interest as, say, the immunity of nonresident Connecticut servicemen to be free of Connecticut sales and use taxes which contravene § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, see *United States* v. *Sullivan*, 270 F. Supp. 236 (D. Conn. 1967); *United States* v. *Arlington County, Va.*, 326 F.2d 929 (4th Cir. 1964) (servicemen and their families living in Virginia).

None of the cases relied upon by the Court of Appeals holds that § 1341 is a bar to Federal jurisdiction to enforce rights secured by § 1981, nor suggest how dis-

missal of this action for lack of Federal jurisdiction to grant the relief requested would prevent the evils that the statute was designed to meet. The principal case discussed, *American Commuters Ass'n* v. *Levitt*, 405 F.2d 1148 (2d Cir. 1969), was a challenge by out-of-state commuters to the New York income tax statute which subjected their New York-earned income to the state tax, and thus came directly within the policy considerations justifying the application of § 1341. The distinction urged here was suggested in dicta in *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), cert. denied, 386 U.S. 1033 (1967), in which the Seventh Circuit disallowed a Federal court test of the applicability of the Wisconsin income tax to in-state earned income of out-of-state commuters, but also indicated that § 1341 would not be a jurisdictional bar to relief where the state tax amounted to a deprivation of "personal liberty" and that its decision was not to be construed as saying that "under other circumstances, an effort to adjudicate 'human rights' under the Federal Constitution may not be asserted in a federal court, even though another forum may be open." 371 F.2d at 175.*

If, as this Court recently has re-affirmed, *Mitchum* v. *Foster*, ____ U.S. ____, 32 L.Ed.2d 705 (42 U.S.C. § 1983 is an exception to the jurisdictional limitations of 28 U.S.C. § 2283), Congress in enacting the Reconstruction statutes radically altered 18th Century principles of Federalism and intended "to interpose the federal courts between the States and the people, as

*Indeed, this distinction is implicit in the decision of this Court allowing an injunction against the Virginia poll tax despite the strictures of 28 U.S.C. § 1341. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'," 32 L.Ed.2d at 717, to effectuate a basic change "whereby the national courts became the primary forum for the vindication of federal rights," H. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727 (1953), and "did constitute the federal government the protector of the civil rights. . . of the individual" J. ten Broek, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 202-03 (1951), then substantial questions are presented, which should be resolved, when a jurisdictional statute which by all indications was never intended to block relief authorized by the Act of May 31, 1870, is applied by a Court of Appeals to deny persons deprived of rights secured by the 1870 Act their day in Federal court.

II. The Decision Below Raises The Substantial Question Of Whether A Suit For The Refund Of Taxes Paid On Unconstitutional And Illegal Assessments Is Barred By 28 U.S.C. § 1341.

The Fifth Circuit holds that although a suit for a refund of taxes paid on unconstitutional and illegal assessments is not specifically barred by the express language of 28 U.S.C. § 1341, which provides only that Federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," nevertheless "sound judicial policy" (463 F.2d at 26) which precludes Federal "anticipatory re-

lief" (463 F.2d at 27) in state tax matters precludes consideration by Federal courts of actions for a refund of unconstitutionally and illegally assessed taxes as well.

On its face, the opinion below appears to contravene the firmly established principle of statutory construction that encroachments on the Federal judiciary's power to vindicate rights secured by the Constitution must be construed narrowly. Cf. *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). If Congress had intended to bar actions in Federal court for a refund of illegally collected state taxes, it could have easily done so by including such a proscription in the statute. The failure of Congress in enacting § 1341 specifically to prohibit refund relief has led several courts to conclude that such relief is not barred by the statute.

> "It is not apparent to this Court that a statute which in plain language prohibits a District Court from *enjoining, suspending* or *restraining* the assessment, levy or collection of any tax under state law has any conceivable application to this cause of action. A suit to recover money paid as taxes by an allegedly illegal assessment is far removed from an action to enjoin, suspend or restrain the assessment, levy or collection of a tax, and to hold that Section 1341, Title 28 U.S.C.A. controls such an action at law would require this Court to ignore well established principles of statutory construction." *Central Steel & Wire Co.* v. *City of Detroit*, 99 F.Supp. 639, 640-41 (E.D. Mich.

1951), on rehearing, same result, 101 F.Supp. 470 (E.D. Mich. 1951).

Accord: *Georgia Pacific Corp.* v. *County of Mendocino*, 340 F.Supp. 1061, 1064-65 (N.D. Cal. 1972); *Southland Mall, Inc.* v. *Garner*, 293 F. Supp. 1370 (W.D. Tenn. 1968); *Rico Argentine Mining Co.* v. *Board of County Commissioners*, 215 F. Supp. 208 (D. Colo. 1963); Annot., *Construction and Application of Federal Statute (28 USC § 1341) Prohibiting Federal District Courts From Interfering With Assessment, Levy or Collection of State Taxes*, 17 L.Ed.2d 1026, 1052.

The policy considerations justifying a prohibition against Federal anticipatory relief — such as an injunction or declaratory judgment against collection of a state tax, *Perez* v. *Ledesma*, 401 U.S. 82, 127 n. 17 (Brennan, J., concurring and dissenting) — are not present in a suit for a refund of unlawfully collected taxes. There is no disruption of the administration procedures of the tax collection process, and there is no damage to the state's budget or risk to the state of taxpayer insolvency since the state has collected and has the use of money during the pendency of the litigation. Further, when the Federal constitutional question does not rest on the interpretation of any ambiguities of state law, but merely involves the unlawful application of state statutes conceded to be constitutional on their face, as here, then there is no overriding need for prior adjudication in state courts of what is essentially a Federal statutory and constitutional question.

Thus, to broadly construe the Congressional statute, which prohibits anticipatory Federal adjudication in most cases, also to cover actions seeking a refund of taxes collected on an unconstitutional and illegal assessment is unjustified both under the plain language of the statute and under the policy considerations which led to its enactment, and raises substantial questions, which this Court should resolve, as to the proper interpretation of § 1341 in an action seeking a refund.

III. The Decision Below Raises Substantial Questions Regarding The Standards By Which The Adequacy Of The State Remedy Is To Be Measured In Interpreting 28 U.S.C. § 1341.

According to the provisions of § 1341, Federal courts have jurisdiction to enjoin the assessment, levy or collection of state taxes where the state court remedy is not "plain, speedy, and efficient." If there is no adequate state judicial remedy then the Federal court is not deprived of jurisdiction. 1A J. Moore, FEDERAL PRACTICE ¶ 0.207, p. 2284 (2d ed. 1965). To be adequate, the state remedy must be such as to preserve and encompass the entire Federal claim, *Matthews* v. *Rogers*, 284 U.S. 521, 525 (1932), and if it is shown that there is at least uncertainty regarding the adequacy of the state remedies, such a showing is sufficient to establish that the state remedies are not plain, speedy, and efficient. *Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620 (1946).

Under Mississippi law, the initial assessments may be made by the municipal tax assessor, Miss. Code § 3742-03 (1956 Recomp.), and at a meeting to be held in September or October of each year the municipal governing authorities (here the Mayor and Board of Aldermen) are required to meet to "change, correct, revise, and equalize" the municipal ad valorem property tax assessments. Miss. Code § 3742-12 (1956 Recomp.). Here the municipal tax assessor merely forwarded to the board the assessments of the prior year, and all changes were made by the mayor and board at their statutory meeting. After the "equalization" has been completed, the governing authorities are to give ten days' notice of a meeting of the municipal governing authorities at which objections may be heard, and notice of this meeting to hear objections is to be given in a legal newspaper "published in the municipality' or is to be posted in five or more public places in the municipality. Id.

The governing authorities are required to meet to hear and determine all objections to assessments as prescribed in the notice, Miss. Code § 3742-13 (1956 Recomp.), and after the assessment rolls are finalized "any taxpayer, or any person owning or having a legal interest in any property" aggrieved by the action of the taxing authorities has a right of appeal to the circuit court of the county within twenty days after the final meeting of the municipal governing authorities. Miss. Code § 3742-17 (1956 Recomp.).

The state remedy is patently inadequate to preserve the Federal claim asserted here, is fraught with un-

constitutional conditions which deny due process and equal protection of the laws, and was unavailable as a practical matter to the plaintiffs and the plaintiff class.

1. *Class Action Relief.* Plaintiffs are asserting a claim of class discrimination on behalf of black taxpayers and property owners against racially discriminatory increases in municipal property tax assessments and seek class relief. Although Federal procedure provides for the maintenance of a class action, Rule 23, F.R. Civ. P., Mississippi procedure does not, cf. *Barrett* v. *Coullet*, 263 So.2d 764 (Miss. 1972),[7] and thus pursuit of the single Federal claim would under state procedure require a multiplicity of suits,[8] a condition which renders the state law remedy neither plain, speedy, nor efficient. *Georgia R. and Banking Co.* v.

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[7]This was admitted by the defendants in their memorandum filed in the District Court: "Admittedly Mississippi procedure does not recognize a class action . . . " Defendants' Memorandum of Law, pp. 14-15.

[8]Nor is this omission cured by third party pleading possibilities. As one recent commentary on Mississippi third party pleading has stated: "Isolated quotations from Mississippi circuit and chancery sources indicate a wide third party practice consistent with modern reform. The quotations are deceiving. Joinder of parties, intervention and impleader remain virtually undisturbed in Mississippi since the beginnings of its court system. With a few statutory changes, the rules are those in use in the nineteenth century. Verbal recognition that justice and efficiency require the hearing of all related matters at one time has been negated by legislative inaction and conservative judicial interpretation." R. Patterson and J. Patterson, *A Plea for Procedural Reform in Mississippi*, 42 Miss. L.J. 293, 314 (1971). Joinder and intervention of additional parties are permitted only where authorized by statute, and are allowed only in limited circumstances. Id.

Redwine, 342 U.S. 299, 303 (1952).[9]

2. *Injunctive Relief.* Although Mississippi law provides that one or more taxpayers may institute a chancery proceeding "to restrain the collection of any taxes levied or attempted to be collected without authority of law," Miss. Code § 1340 (1956 Recomp.), jurisdiction under that section appears limited to cases in which the taxing authority has acted beyond its jurisdiction, or in an unauthorized manner without authority in law. *Stone* v. *Kerr*, 10 So.2d 845 (Miss. 1942). The Mississippi Supreme Court has conclusively determined that unlawful assessments are not "an attempt to collect" taxes within the meaning of this section, and state courts have no jurisdiction to enjoin unlawful assessments. *Yazoo & Miss. Valley R. Co.* v. *Adams*, 73 Miss. 229, 19 So. 91 (1895). The statutory right of appeal provided by Miss. Code § 3742-17 (1956 Recomp.) is the exclusive remedy provided by Mississippi law for challenging an unlawful assessment, *Reed* v. *Norman-*

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[9]Even under the prior judge-made rule of judicial self-restraint regarding Federal adjudication of state tax claims, codified in 28 U.S.C. § 1341, Federal jurisdiction was available when the state court remedy required a multiplicity of suits:

> "In so far as concerned prevention of a multiplicity of suits, the preventing of independent actions by numerous taxpayers to recover tax money unconstitutionally collected is sufficient as a ground for [a Federal district court] injunction against collection where all legal questions as to the validity of the levy are common to the several taxpayers . . ." Annot., *Multiplicity of Suits as Ground for Injunction Against Alleged Unconstitutional Tax*, 76 L.Ed. 455, 458.

See, e.g., *Graves* v. *Texas Co.*, 298 U.S. 393, 403 (1936); *Risty* v. *Chicago, R.I. & P.R.Co.*, 270 U.S. 378 (1926); *Union Pacific R. Co.* v. *Board of County Commissioners of Weld County*, 247 U.S. 282 (1918); *Greene v. Louisville & I.R. Co.*, 244 U.S. 499, 520 (1917).

Breaux Lumber Co., 149 Miss. 395, 115 So. 724 (1928), appeal dismissed, 278 U.S. 556 (1928), and if the taxpayer fails to pursue this remedy, chancery courts have no jurisdiction to enjoin the collection of the tax based on the allegedly illegal assessment, *Anderson* v. *Ingersoll*, 62 Miss. 73 (1884), and the taxpayer is concluded from bringing any other action, *Yazoo Delta Investment Co.* v. *Suddoth*, 70 Miss. 416, 12 So. 246 (1893). Thus, under state law, plaintiffs may not obtain their requested injunction against racially discriminatory assessments, and the state law remedy is not adequate to vindicate their Federal claim.[10]

3. *Penalty for unsuccessful appeal.* Mississippi law governing appeals of allegedly unlawful assessments provides that if the appeal from a municipal assessment is decided against the taxpayer, then the aggrieved taxpayer is liable not only for the tax owed and court costs of the proceeding, but also is liable for "judgment . . . on the appeal bond for damages at the rate of ten per centum on the amount in controversy." Miss. Code § 1196 (1956 Recomp.). If the taxpayer wins his appeal, the taxing authority is liable only for court costs, not for the 10 percent penalty which falls only on the losing taxpayer.

The effect of this penalty provision is to increase the taxpayer's obligation as a result of having asserted his statutory right to appeal from the quasi-judicial

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[10] "A remedy at law cannot be considered adequate, so as to prevent [Federal] equitable relief, unless it covers the entire case made by the bill in equity." *Hillsborough Twp.* v. *Cromwell*, supra, at 629, quoting from *Greene* v. *Louisville & I.R. Co.*, 244 U.S. 499, 520 (1917).

final assessment decision of the taxing authority, and thus constitutes an unconstitutional "chilling" condition on the right of appeal, closely analogous to imposing upon a criminal defendant the grisly choice between serving his sentence or asserting his right of appeal and possibly receiving a harsher sentence for no good reason on a new trial. Cf. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967), cert. denied, 390 U.S. 905 (1968). The discriminatory penalty falls only upon one class of unsuccessful appellants, taxpayers, arbitrarily determined. The penalty cannot be justified by a legislative policy of discouraging frivolous appeals, because it can easily have the effect of discouraging not only frivolous appeals, but meritorious appeals as well because assessment of the penalty does not depend upon a finding by the court that the appeal was frivolous or without substantial support.[11] Cf. Rule 38, F.R. App.P., 28 U.S.C. § 1912. The penalty is assessed against all losing taxpayers who appeal their assessment, including those who raised substantial and undecided legal questions which were resolved against them. Nor can the additional tax be justified as a compensation to the taxing authority for defending the appeal because costs are allowed in addition to the penalty, and the 10 percent penalty may, depending upon the case, be more or less than the litigation expenses

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[11]Thus, the existence of the penalty may discourage taxpayer appeals in relation to the wealth of the taxpayer. The poorer the taxpayer — thus the more disadvantaged he is by arbitrarily high tax assessments — the less likely he is to appeal if he must hire a good lawyer, possibly pay court costs, and run the risk of a 10 percent penalty on the amount in controversy as well if he loses.

of the taxing authority. If the legislative policy behind the penalty is to subsidize the litigation of the taxing authority, that policy can be achieved by a more specific and closely drawn provision.

4. *Lack of provision for suspension of assessment pending litigation.* Under Mississippi law, the statutory appeal from an illegal or unconstitutional assessment does not stay the collection of the tax, and therefore the tax must be paid when due, regardless of the appeal. *Grenada Bank* v. *Town of Moorhead*, 160 Miss. 163, 133 So. 666 (1931). The appellant, if successful, must seek a refund of the erroneously paid tax. See Miss. Code § 3742-41 (1956 Recomp.). The failure of state procedure to provide for a stay of collection of the tax owing on the allegedly unlawful assessment, or portion thereof, imposes upon the taxpayer an inequitable burden he should not have to suffer, may result in irreparable damage pending the outcome of protected litigation, and provides a basis for a ruling that the state remedy is not plain, speedy, and efficient. Cf. *Mountain States Power Co.* v. *Public Service Comm'n*, 299 U.S. 167 (1936) (construing 28 U.S.C. § 1342); *Porter* v. *Investors Syndicate*, 286 U.S. 461 (1931).

5. *Lack of provision for recovery of interest on illegally assessed taxes which have been collected.* Not only does Mississippi law require the tax to be paid pending litigation on the legality of the assessment, but no provision is made for the successful taxpayer appellant to recover damages or interest on the tax monies illegally withheld from him during the pendency of the litigation. The result is that the state is

unjustly enriched by use of the taxpayer's funds during the appeal, and need not make restitution in the form of interest to the taxpayer for the illegal use of his funds during this period. Whether this defect renders the state law remedy inadequate for purposes of § 1341 was a question expressly left undecided in *Dep't of Employment* v. *United States*, supra, 385 U.S. at 358, and should now be resolved. Several courts, including the Ninth Circuit, have determined that the omission to provide interest on a successful refund renders the state remedy inadequate, *Mullaney* v. *Hess*, 189 F.2d 417, 420 (9th Cir. 1951) (dictum); *Southern California Tel. Co.* v. *Hopkins*, 13 F.2d 814 (9th Cir. 1926) aff'd, 275 U.S. 393 (1928); *United States* v. *Livingston*, 179 F.Supp. 9, 15 (E.D.S.C. 1959), aff'd per curiam, 364 U.S. 281 (1960); *Nutt* v. *Allerbe*, 56 F.2d 1058, 1062-63 (E.D.S.C. 1932); *Southern R. Co.* v. *Query*, 21 F.2d 333 (E.D.S.C. 1927); *Proctor & Gamble Distr. Co.* v. *Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924). It also is arguable that the implicit decision of the Fifth Circuit in this case that such an omission does not render the state remedy inadequate conflicts with earlier decisions of this Court, *United States* v. *Livingston*, 364 U.S. 281 (1960), affirming per curiam 179 F.Supp. 9 (E.D.S.C. 1959); *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 386 n. 2 (1931); *Hopkins* v. *Southern California Tel. Co.*, 275 U.S. 393, 399-400 (1928), affirming 13 F.2d 814 (9th Cir. 1926).

6. *Practical unavailability.* The uncontradicted evidence in this case shows that none of the affected black taxpayers learned of the discrimination in assessment increases perpetrated against them until after the stat-

utory ten-day period for protests had expired, and that the notice procedure used was inadequate as a practical matter to inform the affected taxpayer of the discrimination which had occurred. Notice merely that the assessment rolls had been "equalized"[18] was published in a newspaper not printed in Edwards and available to Edwards residents only by subscription, and its circulation is small. Similar notices were posted in some public places, but the proof failed to demonstrate conclusively that such notices were posted in "five (5) or more public places" as Miss. Code § 3742-

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[18]The published notice stated only as follows:

"PUBLIC NOTICE TO THE PUBLIC AND TO THE TAX PAYERS OF THE TOWN OF EDWARDS, HINDS COUNTY, MISSISSIPPI.

You are hereby notified that the real and personal assessment rolls of the above named Town of Edwards for the year 1966 have been equalized according to law; and that said rolls are ready for inspection and examination and that any objections to said rolls, or any assessments therein contained, shall be made IN WRITING and filed with the Clerk of the Town of Edwards, Mississippi on or before the 29th day of November, 1966, at her office, in said Town of Edwards; and that all assessments to which no objections are then and there made will be finally approved by said Mayor and Board of Aldermen of the Town of Edwards; and that all assessments to which objections are made, and which may be correctly and properly determined by said Board will be made final and that said rolls and assessments therein contained will be approved by said Board; and that;

1. This Board will be in session for the purpose of hearing objections to said assessments which may be filed, at the Mayor's Office, in the Town of Edwards, said County, and State, on the 29th day of November, 1966, at 7:30 P.M., and;
2. This Board will remain in session from day to day until all objections legally filed shall have been disposed of and all proper corrections made in said rolls."

12 (1956 Recomp.) requires. No individual notices were given to any of the affected taxpayers, and the names of the persons whose assessments had been increased were not included in any of the official notices. Black property owners in Edwards are largely illiterate, and the newspaper in which the official notice was published is considered a newspaper for whites, and generally does not circulate in the black community. Even if the affected black taxpayers had learned of the discrimination against them, their first appeal under state law was to the municipal governing authorities who themselves were responsible for the discrimination, and § 1341 does not require aggrieved parties to pursue futile state remedies. *Anderson* v. *Ellington*, 300 F. Supp. 789, 793-94 (M.D. Tenn. 1969) (three-judge court). Subsequent protests, after the period for statutory appeals had expired, were not recognized and had no effect.

The deadline under state law for protesting these 1966 discriminatory assessment increases has long passed, and plaintiffs and their class have no presently available state remedies for gaining relief from the invidious discrimination against them. Under these circumstances, the state remedy cannot be said to have afforded adequate relief for the vindication of the claimed Federal rights. The cases interpreting the application of § 1341 are clear that Federal courts should not abstain from passing upon the constitutionality of state action when there is no longer any possibility that review of such action in state court might render such Federal scrutiny unnecessary. *Hillsborough Twp.* v. *Cromwell*, supra.

In judging plaintiffs' claims that the state law remedy was not plain, speedy and efficient for the vindication of the Federal rights asserted, the Court of Appeals in its decision failed adequately to discuss or resolve these substantial questions presented by the plaintiffs, but merely held that Mississippi law was adequate on the basis of two decisions[13] in which these specific issues were not raised. This disposition raises substantial questions, which should be resolved by this Court, regarding the standards by which the adequacy of the state remedy is to be measured in interpreting § 1341, particularly with regard to those points on which plaintiffs' position is supported by controlling decisions of this Court which were not cited or discussed in the decision of the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[13]*Matthews v. Rogers*, 284 U.S. 521 (1932); *Charles R. Shepherd, Inc. v. Monaghan*, 256 F.2d 552 (5th Cir. 1968).

A. OPINION OF THE DISTRICT COURT.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(Number and Title Omitted)

(Filed: Aug. 3, 1970)

The plaintiffs in this case are Negro taxpayers and citizens in the municipality of Edwards, Mississippi. The defendants in this case are officials of that municipality. This suit complains of discrimination by these officials against these Negro taxpayers in the assessment of their real property for ad valorem taxes for the year 1966 on account of their race, and because of their participation in a boycott of the merchants of that town for approximately two months in that year.

This case has been fully heard and considered by the court with live testimony and a deposition. The matter has been ably presented by both sides, factually and on the questions of law involved. The motion to dismiss the complaint for lack of jurisdiction was overruled out of an abundance of precaution on account of the nature of the claim, and the possibility that something may have developed from the evidence to give rise to a claim here. This is not a civil rights case. It is simply a vigorous protest by a group of Negro taxpayers of their ad valorem tax assessments beginning with the year 1966. The findings and conclusions of the court thereon will be presently stated.

The town of Edwards is a small municipality with approximately, 1,200 inhabitants and is situated approximately thirty miles west of the capitol city of Jackson, Mississippi. In 1966, the Negro people in Edwards boycotted the white merchants in Edwards and continued that activity for approximately two months with substantial economic impact upon this small municipality. An alderman, seeking to get a leader to discontinue the boycott, said: "Your taxes are going to be double. Your taxes and mine too. They are going to be double. And he said, y'all better go vote this boycott out. So, he talked and talked and he said, now, my taxes are going to be double and also yours are going to be double." McGee deposition, pp. 7-8. This statement is seized upon to show discrimination. It not only does not show any discrimination, but only shows the thinking of one of the five aldermen, each of whom had one vote. Incidentally, eleven lots of this alderman, valued at $100 each, were assessed in 1966 for $250 each.

All of the taxpayers there know the municipal officials personally, and all of said officials know practically all of the taxpayers, or at least know whether a taxpayer is black or white. The plaintiffs here contend that the defendants arbitrarily raised their ad valorem taxes in 1966 solely by reason of their boycott activities, and they seek relief in this court from all assessments since 1966, which exceed 1965 assessments, and seek recovery here of such difference in cash, or as credit on such assessments and seek mandatory injunctive relief here to require the municipality to employ appraisers to appraise all properties in

the municipality to aid and assist such officials in reassessing their properties in accordance with such appraisals. The plaintiffs impugn the honesty of such assessments and must establish their claims by clear and convincing evidence to show that such assessments are void to entitle them to make a collateral attack thereon. There has been no substantial change in any of these assessments since 1966. The parties have stipulated as to certain facts under date of July 1, 1970 and July 15, 1970, and this court adopts as a part of its findings those facts as therein stated by reference thereto.

Two hundred thirty-seven lots owned by Negroes in 1966 were increased on the assessment roll, while thirty-nine lots owned by Negroes in the town in 1966 were not increased in valuation on the assessment roll. At the same time on the assessment roll, thirty-four lots owned by white people were increased, while one hundred sixty-six lots owned by white people were not increased. The assessed value of one lot owned by a white person (Tupper) was decreased because the building thereon had been removed. The complaint here hinges around the fact that in 1965 all lots owned by Negroes were assessed at a total valuation of $250,300, while the same lots (without any change in the improvements thereon in several instances) were increased $131,800 over the 1965 figure, or an increase of 52.6%. In 1965, the total assessed value of all lots belonging to white people in Edwards was $461,100. In 1966, the total assessment of all white owned lots was increased by only $16,500 over the 1965 figure, or an increase of 3.5%. With the reduction of the assess-

ment of the white owned lot of $1,000 because of the removal of the building previously thereon, the net increase of the total assessment on such lots was $15,500, or an increase of 3.4%.

The city used the county assessment roll as the basis for making up its own assessment roll. One colored property owner testified that her property was sharply increased on the 1966 assessment roll without any change in or addition of any improvements on her property since 1965. Other plaintiffs were present in court and would have testified to the same effect, but their testimony would have been cumulative. She clearly felt in her own mind that she had been discriminated against solely by reason of her race and because of her civil rights activities, but this court could not even detect a trace of factual support for that view anywhere in this entire case. This woman's property was increased in value, but the evidence does not show that her assessment was excessive in any respect, or that it was not fully justified in fact and in law.

No member of the Board of Aldermen is a realtor, or has had any experience in appraising real property, but they are all business people who own property themselves and have lived there many years, and are acquainted generally with all of such properties and their reasonable market value. No realtor or real estate appraiser was offered by either side as a witness in this case. Nothing was shown by any testimony, or any evidence which impugned the honesty, or integrity, or fairness of any member of the Board of Aldermen who made this assessment without any participation of the Mayor, who votes only in case of a tie.

This municipality has a policy in furtherance of their official duty not to assess the properties for an amount which will produce revenues in excess of their reasonably anticipated needs. That policy was rigidly applied and enforced in 1965 and in 1966 and in subsequent years. There has been no change in the millage in the assessment in 1965 and in 1966 and subsequent years, but the only change has been in the valuation of the property for such ad valorem taxes. One of the aldermen (Tupper), who is a large landowner in and around Edwards, is accused of having had a conversation on the streets of the city wherein he referred to "Niggers," with the use of epithets, and said that their taxes would be increased, presumably on account of such boycott activities. The conversation was overheard by a Negro witness for the defendants who denied that any such statements had been made. Those statements, whether made or not, would have no convincing, or controlling effect on a proper decision of the issues in this case. The undisputed testimony in this case shows that neither race nor the boycott was ever mentioned, or in any wise considered by the aldermen in making their 1966 assessments of these properties of these colored taxpayers. Significantly, one of the aldermen had twelve pieces of property in his name on the 1966 roll, and eleven of them were increased in valuation from $100 a lot to $250 a lot. Now there are two Negro aldermen and three white aldermen in Edwards who have been in office while at least two assessment rolls have been equalized and approved without any change therein. Nobody on the Board of Aldermen was or is a merchant in Edwards. The Mayor, who had no vote on an equalization of the assess-

ment roll, is manager for the Standard Oil Company there, and his business may have been indirectly affected by the boycott, but that fact had no influence on the honesty, or integrity of this land assessment roll. Incidentally, the Mayor said that race relations in his city had never been better than they are now.

In an effort to disparage the validity of this 1966 assessment roll of this municipality in this class action of Negro people, there was introduced as a witness a professor from Tougaloo College who got his PhD at Harvard in sociology in 1968, who qualified as an expert on statistics. He testified in substance that the facts and circumstances in this case showed conclusively that these assessments of these Negro people's property in 1966 was discriminatory and that his test showed conclusively and irrefutably that such assessments could only result from a consideration by these aldermen of the civil rights activities of these Negro taxpayers. He knew nothing of and did not attempt to testify as to the value of any of these Negro properties, or the fairness, or justness, or propriety of the assessed valuation thereof. He has a very imposing record as an educator, and testified very cogently and earnestly and sincerely as to his conclusions from such tests, but that type and character and quality of testimony does not rise to the level of a preponderance and certainly not as sufficient to convince this court by clear evidence that this assessment roll as to these colored people is dishonest and crooked and void. In the first place, this testimony is objectionable as clearly invading the province of this court even though such an area is entirely preempted as to experts. This court

is not even bound to accept and act upon any such expert testimony, even if credible and convincing and even if uncontradicted.[1] It is true that direct testimony to establish facts as contended by these plaintiffs is difficult to procure in any case, but difficulty of proof is no reason, or justification for any lessening of the requirement for the quantum and quality of proof being offered to convince the trier of fact of the truth in such matter.

In this case, it is not disputed and is thus an established fact that this municipality did everything necessary exactly as required by statute to create this assessment roll, to give legal notice of the availability of the roll at the city hall for inspection and criticism by the taxpayer, and to equalize and approve such roll to make a perfectly valid assessment of all real property in Edwards, Mississippi for 1966 and subsequent years.[2] Not one of these plaintiffs filed any ob-

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[1]A trier of facts need not accept the opinion testimony of expert witnesses even though uncontradicted. *Boon Enterprises, Inc. v. Carstairs*, (5CA) 312 F.2d 323; *Alfred Griffin v. Missouri Pacific Railroad Company*, (5CA) 413 F.2d 9; Cf: *Daniel J. Sentilles v. Inter Caribbean Shipping Corporation*, 80 S.Ct. 173; *Rollo Reeves v. Pacific Far East Lines, Inc.*, 90 S.Ct. 213.

The trial judge has broad discretion in the matter of the admission or exclusion of expert evidence and his action is to be sustained unless manifestly erroneous. *Spring Company v. Edgar*, 99 U.S. 645, 658; *James Victor Salem v. United States Lines Company*, 82 S.Ct. 1119.

[2]Section 1858 Mississippi Code 1942 — Publication, in what newspaper: "Whenever it is required by law that any summons, order, citation advertisement or other legal notice shall be published in a newspaper in this state, it shall mean publication in some newspaper distributed to subscribers paying the regular subscription rate therefor and having a general

jection to said assessment roll, or ever sought any change therein, or modification thereof as invited in the public notice so to do, and none of them pursued any of the statutory remedies afforded taxpayers for an expedited hearing in the Circuit Court and even an appeal to the Supreme Court, if necessary.[3] On the

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circulation among the people which has been established and published continuously for at least twelve (12) months next prior to the first publication of such matter to be published, etc."

In addition, the proof showed that five notices were posted conspicuously in public places in the town of Edwards notifying all taxpayers that the rolls had been equalized and were open for inspection by the taxpayers for any objections thereto. No objections were interposed. The rolls were approved and duly certified to the tax collector for the collection of such taxes on said properties.

[3]Assessments in municipalities are equalized under §3742-12 Mississippi Code 1942, viz: "The governing authorities of every municipality shall, at a regular or special meeting to be held in September or October in each year, (unless a different time be fixed by order) receive the assessment rolls of real and personl property from the assessor and shall proceed to change, correct, revise, and equalize said assessments in the same manner and with the same powers as is provided for the equalization of assessments by county boards of supervisors. When the equalization has been completed, the governing authorities shall give ten (10) days' notice of the regular or special meeting at which objections to such assessments will be heard. The notice shall be given by publication at least one time in a legal newspaper, if there be one published in the municipality, and if no such newspaper be published in the municipality, the notice shall be given by posting written notices thereof in five (5) or more public places in the municipality."

When the rolls are equalized they are approved under §3742-13 Mississippi Code 1942, viz: "The governing authorities, upon completion of the equalization, correction and revision of the assessment roll or rolls, shall enter an order approving the rolls and the assessments therein contained, subject to the right of parties in interest to be heard on objections as provided. The order adopted, approving the rolls and the assessment shall state the total assessment of the land

contrary, these taxpayers paid their taxes for 1966. Some of them have protested the same assessment in 1969 and their protests were denied. The testimony does not show the present status of these protests; as to whether or not appeals were taken to the Circuit Court, or tried de novo before a jury or not. The rolls for 1970 have not been equalized or approved at this time. The plaintiffs in this connection seek injunctive relief and relief as a class on the contention that the state remedy is not as adequate and as efficient and expeditious as is the remedy provided by Title

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roll and separately of the personal roll, but this shall not be required in the case of towns and villages."

An opportunity is offered the taxpayer to object to the assessment under §3742-14 Mississippi Code 1942, viz: "The governing authorities of each municipality shall hold a meeting at the city hall, or at such other place as their regular meetings are held, on the date specified in the notice to hear objections to the real and personal rolls and the assessments therein contained. The governing authorities shall hear and determine all objections, and shall sit from day to day until the same shall have been disposed of, and all proper corrections made. The proceedings had shall, in all respects, conform to the requirements of law governing such meetings of the county board of supervisors."

After objections are heard and determined, the assessment roll is then finally approved under §3742-15 Mississippi Code 1942, viz: "The governing authorities, after having heard and determined all objections to the assessment roll, or rolls, and the assessments therein contained, shall approve the same by an order entered on the minutes; and such order shall state the grand total of the personal roll and the grand total of the land roll. In the event the municipality has added territory, the order shall recite, separately, the above totals for the municipality, for the added territory, and the grand total for the separate school district." Then the roll is certified to the tax collector as his warrant for the collection of taxes and sale of land for any delinquency.

42 U.S.C.A. §1983 and Title 28 U.S.C.A. §§1331 and 1343 primarily for the reason that class actions in such cases are not permissible in the state courts. That contention is unsound and untenable for several reasons.*

It is the firm view of this court under all of the facts and circumstances in this case that this 1966 and subsequent rolls are valid and fair assessments of all real estate in Edwards, Mississippi for the year 1966 and thereafter insofar as it is necessary to make such determination on the issues in this case; that such assessments do not involve and are not infused by any consideration whatever of the race of these plaintiffs, or the fact that they may or not have participated in a boycott of the merchants in Edwards in 1966.

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*It is the duty of persons claiming to have been illegally assessed to avail themselves of the statutory remedy before applying to a federal court for relief. *First National Bank of Greenville v. Gildart, Tax Collector*, (5CA) 64 F.2d 873, cert. denied 54 S.Ct. 50. Citing *"Prentiss v. Atlantic Coast Line Railway*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; Keokuk & Hamilton Bridge Co. v. Salm, 258 U.S. 122, 42 S.Ct. 207, 66 L.Ed. 496; McGregor v. Hogan, 263 U.S. 234, 44 S.Ct. 50, 68 L.Ed. 282; First Nat. Bank v. Board of Com'rs of Weld County, Colo., 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; Porter v. Investors' Syndicate, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226; Id., 287 U.S. 346, 53 S.Ct. 132. It is only when the proceeding provided in the state court is purely judicial that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a review in the state courts." To the same effect is *Reed, Tax Collector v. Norman-Bressur Lumber Co.*, 115 So. 724, appeal dismissed 49 S.Ct. 14.

This is an administrative proceeding in rem against real property, resulting in an assessment which when finally approved is a warrant to the tax collector to collect the tax or sell the propery. The assessment was not protested. It became final. Plaintiffs paid the tax in full without availing of any statutory remedy to complaint of discrimination and now seek by collateral attack to litigate the validity of this 1966 assessment.

There is no evidence before the court that any piece of property belonging to these black citizens was overassessed. A color photo of the home property of Alsie Irving shows the property to be clearly worth $3,000 to $3,500 and to be assessed for $1,000. That attractive lot has a front of 90 feet and depth of 104 feet with indoor plumbing. The property of Walton Rachel from the color photo should be valued at approximately $4,000, was assessed for $1,500. The property of Mrs. Alma Tatum on a lot 300x400 feet should be worth at least $4,000 and was assessed for $1,200. Those few pictures were picked indiscriminately on plaintiffs' exhibit. They do not show the age of the house or the number of rooms in the house, but these properties were obviously owned by prideful people. Nobody could look at these appraisal forms with the scant information given, and say with any degree of assurance that any assessment shown thereon was excessive. The attractive home of C. G. Reed was assessed for only $2,000. Significantly, this house appears to have a tile roof, but its roof construction is not stated. The age of these houses, roof construction, number of rooms, and type of flooring are extremely important to any proper appraisal, but this information was not important to the expert statistician from Harvard.

The plaintiffs are not entitled to any injunctive relief against this municipality on their assessment of ad valorem taxes for any of the years in suit.[8] This Circuit

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[8] 28 U.S.C., 1958 Edition, §1341 provides: "'Taxes by states' — district courts shall not enjoin, suspend or restraint the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy be had in the courts of

has said in civil rights cases that when statistics are offered that they listen. This court has patiently and courteously listened to everything said by the plaintiffs' expert statistician and was not convinced thereby as to any of his conclusions which affect the validity of these assessments. The testimony of this so-called expert witness did not impress the court with the soundness of his reasons, or his conclusions in undertaking to invade the province of the court in saying that the assessments were discriminatory as to Negro people, and that such assessments were even motivated by their civil rights activities. His premises and conclusions are unsound and his testimony is rejected. The court will now sustain the objection to his testimony in its entirety.

These public officials are presumed to act honestly and honorably in this very delicate field of taxation, and that is one of the very strongest presumptions known to the law. That presumption has not been weakened by the evidence and testimony here. Everybody

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such state."

State law affords the taxpayer an opportunity to protest his ad valorem assessment before the Mayor and aldermen of the municipality. In the event he is displeased with their action, he may appeal to the Circuit Court where the case is tried before a jury. If he is still not satisfied, he may appeal to the Supreme Court of the state. In the interim, his property will not be sold. These expedited hearings afford the taxpayer an expeditious and speedy remedy and this tax may not be enjoined by the federal court. The taxpayer need not pay the tax and is not confronted with any unreasonable penalties or unjust cost. 1966 taxes would not be delinquent until after February 1, 1967. Even if he did not appeal, the property would not be sold until September 1967 and he would have two years to redeem it.

hates to pay taxes and most people seek to find some justification for the criticism of public officials who have the very unpleasant duty of levying and collecting taxes for public needs. That situation is heightened in this case by the emotional appeal incident to civil rights as related to these plaintiffs who are all Negroes. But the law and a court of justice knows no color, and is not in any wise influenced, or persuaded to any conclusion by the race of a litigant, or by any civil rights activity or motivation.

This state has long suffered under the abusive hammer of some appellate judges, and all of the national news media because of our former segregation laws. But, paraphrasing an erudite jurist in one of his cryptic opinions, that malady has been uprooted and removed in its entirety (both "root and branch") from the jurisprudence of Mississippi. The complaint in this case was very probably vulnerable to the motion to dismiss it, but the nature of the charge in general was so serious in such a delicate area of proper constitutional government that the court decided to hear it.[6]

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[6] *Victor Bussie, et ux v. Mrs. Blanche Revere Long, et al*, (5CA) 383 F.2d 766 holds: "It seems to be settled, however, that a complaint seeking to enjoin the collection of taxes is not a suit within the purview of 42 U.S.C.A. §1983 since only a property or monetary right is involved." • • •

"Appellants argue that the Louisiana remedy is not adequate for the reason that relief is afforded to individual taxpayers only as distinguished from relief to all taxpayers in the state in one federal suit through a mandatory injunction against the Tax Commission. It is said to be inadequate because a suit against an assessor to recover taxes under La. R.S. 47:2110 will not force the Tax Commission to do its duty, and that a suit to have their assessments reduced under La. R.S. 47:1998 and 1999 will only indirectly force the equaliza-

Section 112 Mississippi Constitution 1890 requires that taxation be uniform and equal throughout the state and that property be taxed in proportion to its value. This section of the Constitution applies to municipalities. *Labecchia v. Vicksburg*, 20 So.2d 831. This section of the Constitution does not fix absolute equality as a rule, because absolute equality is not obtainable in cases of this kind.[7]

The complaint in this case in its entirety is without merit in fact and in law. These plaintiffs have a perfectly expeditious and valid remedy in the state court to assure the fact that their property is fairly

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tion of assessments."

Fred A. Jewell v. City of Covington, Georgia, et al, (5CA) 425 F.2d 459 holds: "Although federal courts are liberal in their pleading practices, it is still the rule that a general allegation of jurisdiction must be borne out by a well-pleaded claim. See Birnbaum v. Trussel, 2d Cir. 1965, 347 F.2d 86. General conclusionary allegations unsupported by facts are insufficient to constitute a cause of action. See Hoffman v. Halden, 9th Cir. 1959, 268 F.2d 280."

[7]In *Redmond v. City of Jackson*, 108 So. 444, this taxpayer (a Negro) claimed that his assessment was not equal and asserted discrimination. The court said: "We think in appeals of this kind that the property should be assessed on a basis of equality taking the city as a whole. The rule is not that the party can pick out a particular piece of property and claim that it is assessed at a relatively lower figure than his own property. The value of property for assessment in a taxing district like a city is a difficult matter, and different men will have different views, all reasonably formed and entertained with reference to such matters. The record here does not show a purposed discrimination against Redmond, nor was he in fact discriminated against, taking the city as a basis for comparison. In fact, he was under-assessed in the judgment of some of the witnesses testifying. The law does not fix absolute equality as a rule, because absolute equality is not obtainable in cases of this kind. There was no legal discrimination in the assessment before us, etc."

and equally assessed under the requirements of our state constitution according to its fair and reasonable market value. The assessment of this property for taxation at one valuation in 1965 does not in any manner, or to any extent mean in law that the same property cannot be justly and properly assessed in 1966 without any change whatever in the property at a substantially higher valuation. Expertness and preciseness and even absolute equality is not expected or required. The proof of these plaintiffs on the merits in this case invites the court to decide it on conjecture, but it is not even sufficient for a plaintiff to establish his case on probabilities.[8] The plaintiffs on the merits of this case simply have not shown by the greater weight of the more convincing evidence that they have been discriminated against for any reason, or that any valid objection exists to any of the assessments in suit. These assessments were and are valid in every respect. This collateral attack thereon is untenable in every respect and cannot prevail under the facts and circumstances here. This complaint in its entirety is without merit and should be dismissed with prejudice at the costs of the plaintiffs.

The complaint in this case will be dismissed and the relief therein requested will be denied. The findings and conclusions herein comply with all of the requirements of Civil Rule 52(a) in such respect.

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[8]*Hanson K. Dreijer v. Girod Motor Co., Inc.*, (5CA) 294 F.2d 549, 556 says: "The burden of proof requires that the party's evidence indicates the facts on which his recovery depends actually did occur, not merely that it is probable that they occurred. See 2 Harper and James, Law of Torts, §20.2, pp. 1110-1120."

A judgment accordingly may be presented for entry.
August 1, 1970

/s/ Harold Cox
UNITED STATES
DISTRICT JUDGE

B. OPINION OF THE COURT OF APPEALS.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,429

PERCY BLAND, ET AL.,
Plaintiffs-Appellants,

versus

ROBERT McHANN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

(June 29, 1972)

Before GEWIN, AINSWORTH and ALDISERT,*

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*Hon. Ruggero J. Aldisert, of the Third Circuit, sitting by designation.

Circuit Judges.

GEWIN, Circuit Judge: In the summer and fall of 1966 Negroes in Edwards, Mississippi engaged in peaceful protests against local merchants and municipal officials because of alleged racial discrimination. In October and November of 1966 the Mayor of Edwards and the Board of Aldermen met to approve the municipal land assessment; the assessment rolls were approved in mid-November. Town records show that the assessed values of 237 lots owned by Negroes in 1966 were increased on the assessment roll, while 39 lots owned by Negroes were not increased. In contrast, the assessed value of 34 lots owned by white people were increased, while 166 lots were not increased. The assessed value of one lot owned by a white person was decreased, apparently because of the removal of a building.[1]

The complaint in this case was filed by Negro property owners (taxpayers) in Edwards charging that the 1966 increases in property tax assessments of Negroes were solely the result of racial discrimination and were in retaliation for the prior demonstrations.[2] The action

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[1]The parties stipulated and the district court found that in 1965 all lots owned by Negroes were assessed at a total valuation of $250,300, while in 1966 the same lots, without any improvements in many cases, were increased by $131,800 or 52.6%. The 1965 assessment for all lots owned by whites was $461,100. In 1966 the net white assessment was increased by $15,500 or 3.4%.

[2]Taxpayers' complaint requested a preliminary and permanent injunction restraining Edward's officials from increasing real property assessments on the basis of race, and a preliminary and permanent injunction enjoining the town officials from "levying, assessing and collecting any real property ad valorem taxes based on assessments which fail to assess the real property of the plaintiffs and their class in a constitutional and a

was brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343 against the municipal officials of Edwards.[3] The case was tried without a jury.

During the course of the trial a statistician-urban sociologist testified on behalf of the taxpayers that the difference in percentages of the black increases and white increases could not be due to change. He stated that the probability was less than 1 time in 100,000 that such a difference would occur by chance or by a random system of assessment increases.

The district court denied all relief. The court wholly rejected the statistical evidence and found that no evidence of discrimination had been presented. The court further found that the property owners had a "*perfectly expeditious and valid remedy in the state court,*" (emphasis added) and that *none of the plaintiffs had made any effort to avail themselves of that remedy.* Although we agree with the district court that the taxpayers cannot prevail in this action, we do so for reasons in part different from those given by the district court. We therefore affirm in part and in part vacate the judgment of the district court.

In its findings of fact and conclusions of law the district court stated, "The plaintiffs are not entitled to

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racially nondiscriminatory fashion." Taxpayers also sought a money judgment amounting to a full return plus interest of previously collected ad valorem taxes which were alleged to be unconstitutionally and discriminatorily assessed.

[3]The defendants included the Tax Assessor and Collector, the members of the Board of Aldermen, the town clerk and the Mayor of the town of Edwards.

any injunctive relief against this municipality on their assessment of ad valorem taxes for any of the years in suit." The footnote to that statement is to 28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The remainder of the court's opinion appears to deal largely with the merits of the case, although in the final paragraph of the opinion the court concluded that taxpayers had an adequate state remedy. Thus, while the court based its decision in part on § 1341, it also reached the merits and concluded that taxpayers had simply not proved their case. Although it was not inappropriate for the district court to conduct a full and complete hearing, we do not think the court should have reached the merits of the case.[4]

We are convinced that both longstanding judicial policy and congressional restriction of federal jurisdiction in cases involving state tax administration make it the duty of federal courts to withhold relief when a state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax. The taxpayer may assert his federal rights in the state courts and secure a review by the Supreme Court.

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[4]See note 34 infra.

It is well established that § 1341 is an explicit congressional limitation on the jurisdiction of the federal courts in cases which would enjoin, suspend or restrain state tax levy, assessment or collection.[5] Taxpayers seek to circumvent § 1341 by arguing that relief under § 1983 is supplemental and is not limited to any requirement of exhaustion of state remedies. We do not disagree with the general rule that exhaustion is not required in § 1983 cases; however, in this case § 1983 collides full force with a specific congressional limitation on federal jurisdiction. In such circumstances we are convinced that § 1341 must prevail.

The Second Circuit has squarely confronted and resolved this clash. In *American Commuters Ass'n v. Levitt*,[6] the court totally rejected the claim that § 1983 somehow provided an exception to the clear limitations of § 1341:

> [C]onsidering the special attention courts have always shown to tax matters even when constitutional rights are involved ..., plus the unequivocal congressional statement set forth in § 1341, we conclude that when there are adequate state remedies available, § 1341

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[5]Ford Motor Credit Co. v. La. Tax Comm'n, 440 F.2d 675 (5th Cir. 1971); Kiker v. Hefner, 409 F.2d 1067 (5th Cir. 1969) City v. Standard Triumph Motor Co., 347 F.2d 194 (5th Cir. 1965); Henry v. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964); *see* Hillsborough Township v. Cromwell, 326 U.S. 620, 90 L.Ed. 358 (1946) *c.f.* Great Lakes Dredge & Deck Co. v. Huffman, 319 U.S. 293, 87 L.Ed. 1407 (1943); Matthews v. *Rogers*, 284 U.S. 521, 76 L.Ed. 447 (1932).

[6]405 F.2d 1148 (2d Cir. 1969).

means what it so plainly says and that federal jurisdiction is still precluded by it.[7]

It is difficult to gain complete insight into the problem from other prior decisions because of the prevailing idea that § 1983 and 28 U.S.C. § 1343, its jurisdictional counterpart, applied only to actions involving personal rather than property rights. Because of this distinction, courts generally have held § 1983 inapplicable to state tax actions, but then have proceeded to conclude that § 1341 constituted a bar to the action.[8]

The personal versus property rights argument has now been laid to rest. In *Lynch v. Household Finance Corp.*,[9] decided this term, the Supreme Court held that § 1983 applies to deprivations of both personal and property rights.

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[7] *Id.* at 1151. *See* Hickman v. Wojick, 333 F. Supp. 1221 (E.D. N.Y. 1971). In Pintozzi v. Scott, 436 F.2d 374 (7th Cir. 1970) the complaint was brought under 42 U.S.C. §§ 1981, 1983 seeking injunctive relief in a suit involving state tax assessment and collection. The district court held the action was barred by 28 U.S.C. § 1341 and that the civil rights statutes protect personal rights rather than property rights. The Seventh Circuit upheld the § 1341 bar but left the conflict between § 1983 and §1341 unresolved:

> "Without deciding the validity of plaintiff's legal theory, we hold plaintiffs were not denied substantial constitutional rights such as to justify federal intervention in the state court proceedings."

Id. at 378.

[8] *See* Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Gray v. Morgan, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033, 18 L.Ed.2d 596 (1967); Jones v Township, 331 F. Supp. 1281 (D.C. N.J. 1971); Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala. 1968), aff'd per curiam, 393 U.S 9, 21 L.Ed.2d 14 (1968); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962) aff'd per curiam, 373 U.S. 241, 10 L.Ed.2d 409 (1963).

[9] _____ US. _____, 31 L.Ed.2d 424 (1972).

> This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. Today we expressly reject that distinction.[10]

In reaching that conclusion the Court clarified the proper relationship between § 1983 and § 1341. In footnote 6 to the preceding quotation the Court, noting that various cases had been cited by the respondents in support of the "personal rights distinction," stated:

> All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly. . . ."[11]

Thereafter the Court quoted § 1341 and went on to say:

> We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. Dows v. City of Chicago, 11 Wall 108; Matthews v. Rogers, 284 U.S. 521; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293; see also Perez v. Ledezma, 401 U.S. 82, 126-127, n. 17 (opinion of Brennan, J.). The decisions cited by respondents may therefore be seen as consistent with congressional restriction of

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[10] *Id.* at 429.
[11] *Id.* at 429 n.6.

federal jurisdiction in this special class of cases, and with long standing judicial policy.[12]

We are in full accord with the Second Circuit's result in *Levitt* and any doubts we might have had have been completely eradicated by the Supreme Court's explicit elimination in *Lynch* of the personal versus property rights distinction.

Taxpayers argue alternatively that even if § 1341 is applicable to their requests for anticipatory relief it does not preclude their action for a refund. Such a contention has been accepted by several district courts,[13] and focusing solely on the language of the statute the argument is compelling; but there is more.

We begin by noting that this court has already held § 1341 applicable to bar relief under a complaint which sought a refund as well as anticipatory relief. *Kiker v. Hefner*.[14] The Seventh Circuit did likewise in *Gray v. Morgan*.[15] However, in neither of those cases was any explanation given for the inclusion of an action for a refund within the prohibition of § 1341. Thus, while *Kiker* would appear to effectively preclude taxpayer's action, we give further consideration to the question because we think that even apart from the statute, sound judicial policy precludes consideration of the action by this court.

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[12]Id.

[13]Southland Mall, Inc. v. Garner, F.Supp. 1370 (W.D. Tenn.); Rico Argentine Mining Co. v. Board, 215 F. Supp. 208 (D. Colo. 1963); Central Steel & Wire Co. v. City, 101 F.Supp. 470 (E.D. Mich. 1951); Central Steel & Wire Co. v. City, 99 F. Supp. 639 (E.D Mich. 1951).

[14]409 F.2d 1067 (5th Cir. 1969).

[15]371 F.2d 172 (7th Cir. 1966), accord, Nat'l Gas Pipeline Co. v. Sergeant, 337 F. Supp. 88 (D. Kansas 1972).

Prior to the passage of § 1341 the Supreme Court had announced a policy of judicial restraint in matters of state tax administration. In *First National Bank v. Board of County Commissioners*,[16] the Court was faced with an action to recover the amount of certain state taxes. Taxpayer alleged the shares of its bank and other banks in the same county had been assessed upon a valuation grossly in excess of the value of shares in other banks in other counties of the state. The district court dismissed the action after sustaining a demurrer to the complaint. Reversal of that judgment was sought in the Supreme Court on the ground that "the taxes were assessed and collected in contravention of the due process and equal protection clauses of the 14th amendment. . . ." And dicussing the adequacy of the state remedy the Court affirmed the judgment of the district court holding that it was precluded from reaching the merits of the complaint because taxpayers had not availed themselves of an adequate state remedy. This case alone would seem to effectively preclude the action here for a refund if the state remedy is adequate.

In a later case, decided prior to the enactment of § 1341, the Court refused to enjoin the collection of state taxes, even though constitutional claims of invalidity were made where the state remedy was plain, adequate and complete. *Matthews v. Rogers*.[17] In *Rogers* the Court gave two reasons for exercising such restraint:

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[16]284 U.S. 430, 68 L.Ed. 784 (1924).
[17]284 U.S. 521, 76 L.Ed. 447 (1932).

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.[18]

Congress recognized and gave sanction to the judicial practice by the enactment of the predecessor to § 1341.[19] Soon thereafter the Supreme Court was faced with an action for a declaratory judgment that a state tax was unconstitutional. *Great Lakes Dredge & Dock Co. v. Huffman*.[20] Acknowledging that the statute did not expressly include declaratory relief, the Court concluded that it was unnecessary to inquire whether it could be so construed. Instead, the Court relied upon the principles expressed in *Matthews v. Rogers* in concluding that where the state remedy is plain, adequate and complete it is the duty of federal courts to withhold declaratory relief, and to remit the taxpayers to the state courts with ultimate review in the Supreme Court.[21]

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[18]Id. at 525, 76 L.Ed. at 452.

[19]Act of August 21, 1937, 50 Stat. 738, 28 U.S.C.A. § 41(1).

[20]319 U.S. 293, 87 L.Ed. 1407 (1943).

[21]More recently in Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 710 (1971) (concurring in part and dissenting in part), Justice Brennan gave a cogent statement of the reasons underlying the nonintervention of the federal courts in state tax matters. Justice Brennan's comments were made during the course of his effort to illustrate that Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 87 L.Ed. 1407 (1943) relied upon by the majority in Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.

2d 688 (1971), equated declaratory and injunctive relief not because of principles of federalism but because of the peculiar needs of tax administration:

> The special reasons justifying the policy of federal nonintervention with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with state procedures. If federal declaratory relief were available to test state tax assessments, state tax administrators might be thrown into disarray and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess (1937). These considerations make clear that the underlying policy of the anti-tax-injunction statute, 28 U.S.C. § 1341, relied on in Great Lakes bars all anticipatory federal adjudication in this field, not merely federal injunctions.

401 U.S. at 127 n. 17, 27 L.Ed.2d at 730 n. 17.

Taxpayers' argument that § 1341 is limited to state tax problems involving citizens of the state and foreign corporations is not borne out by the decisions of the Supreme Court. It is true that this court in Hargrave v. McKinney, 413 F.2d 320, 325 (5th Cir. 1970), did describe a twofold legislative purpose for § 1341 which referred only to such controversies; however, this court has applied the statute to litigation involving citizens of the same state. Kiker v. Hefner, 409 F.2d 1067 (5th Cir. 1969). As we pointed out in *Hargrave*, the significant distinction there was that plaintiffs sought not to enjoin, restrain or suspend the collection of a state tax but instead to require the collection of additional taxes, 413 R.2d at 326. In doing so we recognized a broader purpose of § 1341: "To protect the integrity of the state treasury." *Id.*

Upon remand of *Hargrave* to a three judge court, Hargrave v.

First National Bank v. Board of County Commissioners, *supra*, clearly would leave taxpayers to their state remedy, if it is plain, adequate and complete. The cases involving anticipatory relief further expound upon the idea that in matters involving state tax law state remedies must be pursued where they are plain, adequate and complete. An action for a refund is an integral part of state tax administration. We see no reason to bifurcate the state remedy. Section 1341 compels the taxpayers to seek anticipatory relief through a plain, speedy and efficient state remedy. An ancillary claim for a refund should properly be joined with it.[22]

Kirk, 313 F. Supp. 944, 947 (M.D. Fla. 1970), the court held § 1341 inapplicable because "the plaintiffs in the instant case are not attempting to strike down an assessment but, on the contrary, are attempting to obtain the right to have such a scheme. In Askew v. Hargrave, 401 U.S. 476, 28 L.Ed.2d 196 (1971) the Supreme Court vacated the judgment of the three judge court and held that the district court should have abstained where there was pending in the state courts a claim which if sustained would "obviate the necessity of determining the Fourteenth Amendment question." The decision was based upon principles of abstention and not § 1341.

[22]One district court has reasoned similarly. In Mandel v. Hutchinson, 336 F. Supp. 772, 779-80 (C.D. Calif. 1971), as here the refund claim was ancillary to the taxpayer's primary claim of continuing unconstitutional action. The court reasoned that since injunctive relief could be granted only in the state courts because of § 1341, for the court to accept jurisdiction over an ancillary claim for a refund would "frustrate the philosophy of undertaking only those cases in which the Court can give complete relief and would tend to generate a multiplicity of actions as well as duplicity of work."

Another district court avoided deciding whether § 1341 applied to an action for a refund by applying principles of abstention. Varian Assoc. v. County, 317 F. Supp. 888, 889 (N.D. Calif. 1970).

Thus, based upon all of the foregoing we conclude that it is the duty of federal courts, in actions for the refund of state taxes, to defer to state administrative and judicial remedies where the state remedy is "plain, speedy and efficient."

Having decided that § 1341 is applicable and that the action for a refund is precluded where the state remedy is adequate the crucial question becomes whether the Mississippi remedy is in fact adequate, i.e. "plain, speedy and efficient."[23] Taxpayers have alleged numerous shortcomings in the Mississippi remedy which they claim render it inadequate.[24] They

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[23]In a recent three judge case in Alabama the court was asked to declare Alabama's ad valorem tax program unconstitutional. Prior to reaching the merits of the action the court rejected defendants claim that 28 U.S.C. § 1341 barred the action. The court found that the "Alabama courts do not afford plaintiffs a plain, speedy and efficient remedy." Weissinger v. Boswell, 330 F. Supp. 615, 618 n.4 (M.D. Ala. 1971).

[24]Taxpayers' objections to the Mississippi remedy are:

1. The Mississippi procedure does not permit a class action and would require a multiplicity of suits.
2. Mississippi law does not permit an injunction against racial discrimination in property tax assessments.
3. Mississippi law places a 10% penalty on unsuccessful appellants from a contest of a tax assessment which is an unconstitutional chill on the right to appeal.
4. The Mississippi statute unconstitutionally places the penalty solely upon an arbitrary class.
5. There is no provision for suspension of the tax while it is being tested in court.
6. Mississippi law makes no provision for the recovery of interest on illegally assessed taxes.
7. The Mississippi remedy, as applied here, did not give adequate notice to taxpayers to allow them to protest and as a practical matter it is not available.

summarize their attack on the Mississippi remedy by assailing it as "too costly and too uncertain to provide the 'plain, speedy and efficient remedy' called for by § 1341."

Taxpayers have made no effort to distinguish *Charles R. Shepherd, Inc. v. Monaghan*[25] in which this court held "it is quite plain that the matter involved is a tax and that under the Johnson Act the federal court has no jurisdiction to restrain its collection, where *as here an adequate remedy is provided for the recovery back if improperly collected.*"[26] (emphasis added). The complaint sought declaratory and injunctive relief against alleged illegal Mississippi taxes. Upon our own review of the Mississippi remedy, we reaffirm *Monaghan*.

The Mississippi Constitution requires that taxation be uniform and equal throughout the state and that property be taxed in proportion to its value.[27] The Mississippi assessment scheme provides for notice that the rolls have been equalized,[28] a means for the hearing of the objections of taxpayers,[29] and for an appeal to the circuit court where the issue is tried de novo.[30] Another statute provides for an appeal as a matter of right to the Mississippi Supreme Court.[31] In addi-

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[25]256 F.2d 882 (5th Cir. 1958).

[26]*Id.* at 884; *see* Matthews v. Rogers, 284 U.S. 521, 76 L.Ed. 447 (1932) where the Supreme Court held the Mississippi remedy adequate.

[27]Miss. Const. Art. 4, § 112.

[28]Miss. Code Tit. 16, § 3742-12.

[29]Miss. Code Tit. § 3742-14.

[30]Miss. Code Tit. 16, § 3742-17.

[31]Miss. Code Tit. 10, § 1147.

tion, § 1340 of the Mississippi Code permits one or more taxpayers to enjoin the collection of any taxes "levied or attempted to be collected without the authority of law."[32]

Although the district court did consider this case on its merits, it also found that "These plaintiffs have a perfectly expeditious and valid remedy in the state court to assure the fact that their property is fairly and equally assessed under the requirements of our state constitution according to its fair and reasonable market value." That finding by a district judge sitting in Mississippi merits significant weight; certainly it is not clearly erroneous.[33]

Taxpayers' complaints that the Mississippi remedy is inadequate appear in reality to be an argument that a *better* remedy would be available in the federal courts. Neither the judicial decisions nor § 1341 requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts. Section 1341 merely requires that the state remedy be "plain, speedy and efficient." Thus, in view of the district court's finding, this court's decision in *Monaghan*, and our own independent review of the available state remedy, we conclude that the Mississippi remedy is plain, speedy and efficient.

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[32]Miss. Code Tit. 10, § 1340.

[33]*See generally* Hillsborough Township v. Cromwell, 326 U.S. 626, 630, 90 L.Ed. 358, 366 (1946); Huddleston v. Dwyer, 322 U.S. 232, 237, 88 L.Ed. 1246, 1249 (1944); City National Bank v. United States, 383 F.2d 341, 342 (5th Cir. 1967); Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967).

The district court decided this case on the merits. As our opinion indicates we think that was inappropriate. Thus, to the extent that the district court relied on § 1341 we affirm; to the extent that it went beyond that issue and decided the merits we vacate the judgment.[34] The Mississippi remedy, as we understand it, contemplates that the taxpayers' claims may be pursued to the state supreme court. Final rejection there would permit review by the United States Supreme Court. That is the appropriate procedure to pursue.[35]

AFFIRMED in part and VACATED in part.

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[34]We intend no criticism of the action taken by the district court. The court observed that the complaint was probably vulnerable to a motion to dismiss but proceeded to a full hearing "because the nature of the charge in general was so serious in such a delicate area of proper constitutional government that the court decided to hear it." The court further observed that the motion to dismiss was overruled "out of an abundance of precaution on account of the nature of the claim, and the possibility that something may have developed from the evidence to give rise to a claim here."

[35]*See* Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 300-301, 87 L.Ed. 1407-1412 (1943); Ford Motor Credit Co. v. La. Tax Comm'n, 440 F.2d 675, 676 (5th Cir. 1971); Gray v. Morgan, 371 F.2d 172, 174 (7th Cir. 1966).

C. ORDER OF THE COURT OF APPEALS DENYING REHEARING AND REHEARING EN BANC.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,429

PERCY BLAND, ET AL.,
Plaintiffs-Appellants,

versus

ROBERT McHANN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion June 29, 1972, 5 Cir., 1972, ____ F.2d ____).

(September 1, 1972)

Before GEWIN, AINSWORTH and ALDISERT,*
Circuit Judges.

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*Hon. Ruggero J. Aldisert, of the Third Circuit, sitting by designation.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.